I hold therefore that with effect from the date of the deed of release the defendant in this case has been a trespasser and that the 1st plaintiff is entitled to the declaration claimed in the Statement of Claim. The 2nd plaintiff will be awarded the following reliefs :—

(1) Possession.

(2) The declaration he seeks in the Statement of Claim and

(3) Damages less the sum of $750 which the defendant has paid to 1st plaintiff and should be recovered by 2nd plaintiff from the Company.

I shall hear argument as to damages and costs.

From the above judgment the defendant appealed.

COURT OF APPEAL.

K. A. Seth (*H. A. Francis* with him) for the appellant-defendant cited: *Megarry* 6th Edn. p. 36; cases where there was no written document: *Booker v. Plamer* (1942) 2 All E.R. 674 at 676, *Errington v. Errington* (1952) 1 All E.R. 149, *Cobb v. Lane* (1952) 1 All E.R. 1199, *Shaw v. Habibulah* (1951) M.L.J. 60; cases where there was a written document: *Selby v. Greaves* L.R. (1867) 3 C.P. 594, *Joel v. International Circus* 124 L.T. 459, *Three D's Co. v. Burrow* (unreported) see 99 L.J. 239-240 and article at p. 564, *Facchini v. Bryson* (1952) 1 T.L.R 1386, and article in 102 L.J. 437.

J. E. Lloyd for the respondents-plaintiffs cited: *Clore v. Theatrical Properties Ltd.* (1936) 3 All E.R. 483, *Frank Ware v. L. C. C.* (1904) 1 K.B. 713, *Helman v. Horsham Assessment Committee* (1949) 1 All E.R. 776, *Jackson v. Simons* (1923) 1 Ch. 373, *Taylor v. Caldwell* 122 E.R. 309, and *Rendell v. Roman* 59 L.T.R. 192.

The judgment of the Court of Appeal was delivered by :—

Sir Charles Murray-Aynsley, C.J. : — There does not appear to be any necessity to add much to the oral judgment given at the hearing. The case was a claim for possession. The whole matter depended on whether the defendant-appellant was a tenant or licensee. In view of the evidence and the documents we came to the conclusion that he was a tenant. The appeal was, therefore, allowed with costs here and below except on the counterclaim, and judgment entered for the defendant-appellant.

Appeal allowed.

COMPTROLLER OF INCOME TAX v. X., CO.

[A. C. J. (Wilson, J.) February 11, 1953]

[K.L. — Selangor Civil Appeal No. 17 of 1952]

Income Tax Ordinance, 1947, s. 39 — Discretion of Comptroller — Whether dividends paid in 1950 were paid out of chargeable income for 1951.

The respondents applied to the Comptroller of Income Tax under section 39 of the Income Tax Ordinance for an amendment to the 1951 assessment on the ground that dividends paid by them in 1950 were paid out of the chargeable income for 1951 and that the rate of tax was higher in 1951 than in 1950. The Comptroller refused the request and the respondents appealed to the Board of Review which allowed the appeal. The Comptroller appealed to the High Court alleging that he had an absolute discretion under the proviso to section 39 not to grant any reduction, and that in any case the dividends were not paid out of the chargeable income for 1951.

Held: the Comptroller has not an absolute discretion, and that the dividends paid in 1950 were paid out of the chargeable income for 1951.

Case referred to :—

(1) *Julius v. Oxford (Lord Bp.)* (1880), 5 App. Cas. 214.

CIVIL APPEAL.

T. V. A. Brodie (Solicitor-General) for the appellant.

F. J. Woodward for the respondents.

Cur. Adv. Vult.

Wilson, J. : — The respondent Company applied to the Comptroller of Income Tax under section 39 of the Income Tax Ordinance for an amendment to the 1951 assessment on the grounds that the dividends paid by the Company in 1950 were paid out of the Company's chargeable income for 1951. The Comptroller refused this request because he stated, he was not satisfied that the dividends paid by the Company in 1950 were paid out of the Company's chargeable income for 1951. The respondent Company thereupon appealed to the Income Tax Board of Review.

The facts and correspondence were agreed and are attached to the grounds of judgment of the Committee of the Board. A preliminary point was taken by the Comptroller of Income Tax that section 39 of the Ordinance confers a discretion on the Comptroller and that there is no provision in that section for an appeal to the Board. The same preliminary point was taken before this Court.

The material words of section 39 are as follows :—

"There shall be levied and paid for each year of assessment upon the chargeable income of every company, tax at the rate of thirty per centum on every dollar of the chargeable income tax thereof.

"Provided that where any company proves to the satisfaction of the Comptroller that any dividends have been paid out of such chargeable income,.....an

amount equal to such dividends.....may be charged at a lower rate or not charged with any tax as the Comptroller shall determine."

The respondents maintain that the words "may be charged must be construed to mean "shall be charged". The appellant, however, contends that if the Legislature intended the words "may be charged" to be construed as "shall be charged", they would have used the words "shall be charged", and maintains that the Comptroller has an absolute discretion to refuse to charge at a lower rate and to refuse not to charge with any tax at all. In other words, he has a discretion to charge at the full rate of thirty per cent. Clearly, the Comptroller has some discretion as he may at any rate charge at a lower rate or not charge with any tax as he shall determine. There is nothing in the proviso to section 39 to guide the Comptroller as to how to fix the lower rate if he decides to charge at a lower rate. It would, therefore, appear that if it was intended that the Comptroller must charge either at a lower rate or not charge with any tax the Comptroller could evade the intention of the Legislature by charging at the rate of 29½ per cent instead of thirty per cent, and from such a charge there would appear to be no appeal. He clearly has some discretion under the proviso to section 39 and section 39 is not referred to in section 30 which gives a right of appeal in respect of the exercise of a discretion in certain cases.

The question as to whether the donee of a power may either exercise it or leave it unused was fully discussed in the case of *Julius v. Oxford (Lord Bp.)*[1]. In that case the words discussed were "it shall be lawful" and it was held that the use of these words gave the Bishop complete discretion to issue or decline to issue a commission. The principle involved in construing enabling words are set down shortly in one sentence by Lord Blackburn at page 244 as follows :—

"The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right."

The question, therefore, arises as to whether the proviso to section 39 confers a legal right upon the respondents. I have come to the conclusion that the Legislature must have intended to confer a legal right and that if the Comptroller were to arbitrarily fix a lower rate there would be a right of appeal under section 75 of the Ordinance to the Board of Review.

It now becomes necessary to consider whether the dividends paid in 1950 were paid out of the chargeable income for 1951. In order to do this, it is necessary, in the first place, to consider what is the meaning of the words "chargeable income". I agree with the view of the Committee of the Board that these words which appear in section 39 paragraph (a) and the proviso to that section have the same meaning as the same words which appear in section 34 of the Ordinance. That section reads as follows :—

"The chargeable income of any person for any year of assessment shall be the remainder of his assessable income for that year after the deductions allowed in this Part of this Ordinance have been made."

It now becomes necessary to consider the meaning of the words "assessable income". Section 33(1) of the Ordinance reads as follows :—

"The assessable income of any person from all sources chargeable with tax under this Ordinance for any year of assessment shall be the remainder of his statutory income for that year after the deductions allowed in this Part of this Ordinance have been made."

In section 31(1) "statutory income" is defined as "the full amount of income for the year preceding the year of assessment".

In view of these definitions I am of opinion that the Committee of the Board were right in finding that assessable income after the deductions allowed in section 34 becomes chargeable income for the purposes of section 39 of the Ordinance and that the chargeable income of the respondents for the year of assessment 1951 was the statutory income of the trading year 1950.

In these circumstances, I agree with the Committee that the dividends paid in 1950 were paid out of the chargeable income for the year of assessment 1951.

The respondents being aggrieved and having appealed to the Board, I am of opinion that the Committee were entitled to order that the assessment be adjusted so as to charge at twenty per cent per annum, an amount equal to the amount of the dividends paid in 1950.

The appeal to this Court must be dismissed with costs.

Appeal dismissed.

MAH KOK CHEONG v. R.

[A. Cr. J. (Spenser Wilkinson, J.) February 13, 1953]

[Penang — Criminal Appeal No. 5 of 1953]

Criminal trial — Burden of proof — Question to be asked by trial Magistrate in coming to decision.

The appellant in this case was originally charged in the Sessions Court with forgery of a railway receipt. After hearing the evidence for the prosecution the learned President amended the charge to one under section 420 of the Penal Code and the amended charge read as follows:—

"That you on 22nd October, 1951, at Prai, cheated a Railway Clerk Ismail by representing to him that you were the consignor of goods and thereby dishonestly induced him to cause to be delivered to you 20 bundles of tin plates valued about $2,000, the property of Chop Nam Poh Hin, an offence under section 420, Penal Code."

The appellant claimed trial to the amended charge and after hearing his defence the learned President